



Network Branded Prepaid Card Association

20 F Street, NW, Suite 700

Washington, DC 20001

202.548.7200

January 25, 2017

Via Email (scott.alvarez@frb.gov)

Mr. Scott G. Alvarez
General Counsel
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Re: Nov. 2nd Revised FAQs on Regulation II

Dear Mr. Alvarez:

We are writing you this letter in response to recent updates to frequently asked questions (“FAQs”) about Regulation II (Debit Card Interchange Fees and Routing), which were issued by the staff (the “**Board Staff**”) of the Board of Governors of the Federal Reserve System (the “**FRB**” or “**Board**”) on Nov. 2, 2016 (the “**Updated FAQ(s)**”).¹ In particular, the Network Branded Prepaid Card Association (the “**NBPCA**”)² is concerned about the contents of new FAQ No. 2 interpreting Section 235.5(d) (*Exceptions to Exemptions from the Interchange Fee Standards*) relating to declined ATM transaction fees (“**New FAQ2**”) because we believe that it directly contradicts the statutory language and legislative intent of the Durbin Amendment³ insofar as there is no “overdraft” associated with ATM decline fees. Further, we believe that the Board should not make such sweeping policy changes through an informal Board Staff FAQ and should have, instead, provided for a formal notice and comment period to collect feedback from covered issuers⁴ and other affected parties.

¹ FederalReserve.gov, [Frequently Asked Questions – Regulation II](https://www.federalreserve.gov/paymentsystems/regii-faqs.htm), available at:

<https://www.federalreserve.gov/paymentsystems/regii-faqs.htm> (last visited Jan. 6, 2017).

² The NBPCA is a nonprofit, inter-industry trade association that supports the growth and success of network branded prepaid cards and represents the common interests of the many participants in this rapidly growing payments category. The NBPCA’s members include banks and financial institutions, the major card networks, processors, program managers, marketing and incentive companies, card manufacturers, card distributors, payment industry consultants and law firms. The comments made in this letter do not necessarily represent the position of all members of the NBPCA.

³ Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which added new Section 920 to the Electronic Funds Transfer Act.

⁴ For purposes of this letter, covered issuer is defined as any issuer which, together with its affiliates, has assets of \$10B or greater.



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As a result of our significant concerns, the NBPCA reached out to Board Staff and held a conference call on Dec. 13, 2016 to explore the reasons behind the issuance of New FAQ2 and to provide the NBPCA's feedback. One of the key takeaways from this conversation was a recommendation from Board Staff that the NBPCA write you a letter to explain our concerns in more detail.

Background on the Overdraft Restrictions Applicable to the Government Administered Payment Card Exemption and Reloadable General Use Prepaid Card Exemption

Section 1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, also known as the Durbin Amendment, inserted a new Section 920 into the Electronic Funds Transfer Act (“EFTA”), which limits interchange transaction fees on debit card transactions and provides certain network routing and exclusivity restrictions. Section 920(a)(7)(A) of the EFTA provides exemptions from the interchange transaction fee caps for certain government administered payment cards (“**Government Benefit Cards**”) and certain reloadable general use prepaid cards (“**GPR Card**”), but only if, after July 21, 2012, the cardholder is not charged any fees for (i) overdrafts, or (ii) the first ATM withdrawal each month from the covered issuer's designated ATM network.

The overdraft restrictions, which appear in Section 920(a)(7)(B)(i) of the EFTA (the “**Overdraft Restrictions**”), read, in relevant part, as follows:

“(B) EXCEPTION.—Notwithstanding subparagraph (A), after the end of the 1-year period beginning on the effective date provided in paragraph (9), this subsection shall apply to an interchange transaction fee charged or received with respect to an electronic debit transaction described in subparagraph (A)(i) in which a person uses a general-use prepaid card, or an electronic debit transaction described in subparagraph (A)(ii), if any of the following fees may be charged to a person with respect to the card:

- (i) *A fee for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance.*” (emphasis added)
- (ii) A fee imposed by the issuer for the first withdrawal per month from an automated teller machine that is part of the issuer's designated automated teller machine network.”

The Board then published its final rules implementing Regulation II on July 20, 2011,⁵ which appear in 12 CFR Part 235 (Debit Card Interchange Fees and Routing). With respect to the Overdraft Restrictions, Section 235.5(d) of the final rules contains the same language that appears in the Durbin Amendment, but with an additional allowance that permits a fee for

⁵ See 76 Fed. Reg. 43394-43475 (July 21, 2011)



transferring funds from another asset account to cover a shortfall in the account accessed by the card. Provided below is the relevant language from Section 235.5(d) of Regulation II.

“(d) Exception. The exemptions in paragraphs (b) and (c) of this section do not apply to any interchange transaction fee received or charged by an issuer on or after July 21, 2012, with respect to an electronic debit transaction if any of the following fees may be charged to a cardholder with respect to the card:

- (1) **A fee or charge for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance, unless the fee or charge is imposed for transferring funds from another asset account to cover a shortfall in the account accessed by the card; or** (emphasis added)
- (2) A fee imposed by the issuer for the first withdrawal per calendar month from an ATM that is part of the issuer's designated ATM network.”⁶

The Board Staff's Interpretation of Section 235.5(d) of Regulation II

New FAQ2 responds to the question of whether an otherwise exempt Government Benefit Card or GPR Card under Regulation II will lose its exemption from the interchange transaction fee caps when a cardholder may be charged a fee for a transaction that is declined at an ATM. According to Board Staff, the answer is “yes” - a debit card transaction completed with an otherwise exempt Government Benefit Card or GPR Card loses the interchange transaction fee cap exemption when a cardholder is charged an ATM decline fee due to a “shortage of funds” in the cardholder's account at the time of the transaction. Provided below is the text of New FAQ2.

“235.5(d) Exceptions to Exemptions from the Interchange Fee Standards

Q2. Beginning on July 21, 2012, will a card lose its exemption if a cardholder may be charged a fee for a transaction that was declined at an ATM?

A2. Yes. Section 235.5(d) provides that debit card transactions that otherwise qualify for the exemptions under § 235.5(b) and (c) from the interchange fee standards will no longer be exempt if the cardholder may be charged a fee with respect to the card for an overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance. ***Accordingly, debit card transactions will lose the exemptions under § 235.5(b) and (c) if the cardholder may be charged an ATM decline fee due to a shortage of funds in the cardholder's account at the time of an ATM transaction.*** (Added November 2, 2016)” (emphasis added)⁷

⁶ 76 Fed. Reg. 43467 (July 21, 2011).

⁷ FederalReserve.gov, Frequently Asked Questions – Regulation II, available at: <https://www.federalreserve.gov/paymentsystems/regii-faqs.htm> (last visited Jan. 6, 2017).



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In our December 13 conversation with Board Staff on this topic, Board Staff explained its belief that a fee for a “shortage of funds” under Section 235.5(d)(1) of Regulation II is synonymous with a non-sufficient funds (“NSF”) fee charged on a checking account. Based on this interpretation and the language in New FAQ2, Board Staff appears to believe that the exemption provided in Section 235.5 for Government Benefit Cards and GPR Cards is lost whenever a cardholder is charged a fee for attempting to conduct an ATM transaction for which the cardholder has insufficient funds in the underlying account, regardless of whether the transaction is authorized and an actual overdraft of the cardholder's account occurs. In fact, an ATM decline transaction actually prevents the occurrence of an overdraft. It is also worth noting that decline fees may be assessed by covered issuers for a variety of reasons unrelated to an insufficient account balance at the time a transaction is attempted, such as a cardholder exceeding transaction limits (e.g., limit of five ATM withdrawals per day). Finally, we are concerned that the Board Staff's analysis could logically be extended to any type of decline fee being charged by a covered issuer for the use of an otherwise exempt Government Benefit Card or a GPR Card, which we believe is inconsistent with the express statutory language and Congressional intent of the Durbin Amendment as further explained below.

NBPCA's Analysis of the Overdraft Restrictions

Statutory Construction.

The NBPCA interprets the statutory language of the Overdraft Restriction to generally prohibit overdraft fees, then provide two specific examples of the types of overdraft fees that are prohibited - rather than providing three separate types of prohibited fees, which is inferred by the Board Staff's analysis. In particular, by applying general principles of statutory construction, the language in the statute appearing after the word “including” provides two separate examples where overdraft fees have been typically charged in the past and are now prohibited under the Durbin Amendment in order to qualify for the interchange transaction fee cap exemption for Government Benefits Cards and GPR Cards. Namely, the examples include the case where the covered issuer charges an overdraft fee for a “transaction processed for an amount exceeding the account balance” and the case where the covered issuer charges an overdraft fee whenever there is a “shortage of funds” or negative balance in the account during the course of the month.

In its most basic terms, Merriam Webster defines an “**overdraft**” as “*the act or result of drawing on a bank account for more than the balance*”⁸ (*emphasis added*). In a similar manner, Regulation E defines the term “**overdraft service**” as “*a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a*

⁸ Merriam-Webster Dictionary, Overdraft, available at: <https://www.merriam-webster.com/dictionary/overdraft> (last visited Jan. 6 2017).



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*transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account*⁹ (emphasis added), and, as a result of the transaction, the account will have a negative balance. We can provide several additional definitions, but the consistent premise in all definitions of the term “overdraft” is that the account balance must be taken below zero for an “overdraft” to occur.

Following that premise, the first example of an overdraft fee contained in the Overdraft Restrictions for “*a transaction processed for an amount exceeding the account balance*” describes a traditional opt in overdraft program where an issuer affirmatively allows a transaction to take the prepaid account balance negative up to a pre-determined limit and typically charges a flat fee for that particular transaction.

Similarly, the second example of an overdraft fee contained in the Overdraft Restrictions for a “*shortage of funds*” describes a relatively common scenario (at the time the Durbin Amendment was passed) of charging a fee if an account balance goes negative for any reason during a particular month or if a negative balance is not replenished before the end of a set period of time (typically between three and five consecutive days), even if the issuer does not permit the type of intentional overdraft transactions described in the above paragraph. This type of overdraft fee is sometimes called a “negative balance fee.” In fact, the CFPB describes this type of overdraft fee in its Final Rule on Prepaid Accounts as follows:

“Apart from actual overdraft programs, some prepaid programs, according to their terms and conditions, reserve the right to impose a fee for a negative balance on a prepaid account. (These programs' agreements typically state that the cardholder is not permitted to spend beyond the balance in the prepaid account, but if circumstances were to occur that cause the balance to go negative, a fee will or may be imposed. Some agreements state that repeated attempts to spend beyond the card balance will or may result in the prepaid account being closed).”¹⁰

One type of transaction that could cause an account to go negative, even though the issuer does not permit traditional opt in overdraft transactions as described above, are so called “force pay” transactions, which are described in more detail in the NBPCA's Comment Letter to the CFPB for its Notice of Proposed Rulemaking for Prepaid Accounts.¹¹

⁹ 12 CFR §1005.17(a).

¹⁰ ConsumerFinance.gov, [Prepaid Accounts under the Electronic Fund Transfer Act \(Regulation E\) and the Truth In Lending Act \(Regulation Z\)](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20161005_cfpb_Final_Rule_Prepaid_Accounts.pdf), Pg. 39, n.100, available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/20161005_cfpb_Final_Rule_Prepaid_Accounts.pdf.

¹¹ See pages 12-15 from the NBPCA Comment Letter to the CFPB on the Notice of Proposed Rulemaking for Prepaid Accounts for a detailed explanation of “force pay” transactions, available at:

<http://www.nbpc.org/en/~media/Files/Public%20Comment%20Letters/NBPCA%20Comment%20Letter%20on%20CFPB%20Prepaid%20Accounts%20NPRM.ashx>.



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It is also important to note that other regulators view overdraft fees and NSF fees as separate and distinct items. For example, you can look to Regulation DD¹² implementing the Truth-In-Savings Act, which is now administered by the CFPB. In the official interpretation to Section 1030.11(a)(1) regarding the disclosure of total fees on periodic statements, as originally adopted by the Board, Regulation DD requires separate disclosures for (i) overdraft fees and (ii) fees for returning items unpaid such as a “returned item fee” or an “NSF fee.”¹³

Legislative History and Congressional Intent.

While there is a limited Congressional record regarding the Durbin Amendment since it was a late addition to the Dodd-Frank Act shortly before its passage, based on the NBPCA's interaction with Members of Congress at the time, we strongly believe that the legislative intent of the Overdraft Restriction is to prohibit the two types of overdraft fees described above that were commonly charged at the time of passage of the Durbin Amendment.

Bolstering this assertion is the fact that Rep. Corinne Brown (D-Fla.) made a statement on the House Floor in support of the Durbin Amendment in which she recognized the inclusion of pro-consumer overdraft language from a bill sponsored by Rep. Sander Levin (D-MI).¹⁴ In particular, she was referring to the Benefit Card Fairness Act of 2010 (H.R. 4552) (“**BCFA**”),¹⁵ which was introduced by Rep. Sander Levin (D-MI) in January 2010. The BCFA prohibits 12 specific types of fees on government benefit cards including a fee for “[a]n overdraft, including a shortage of funds or a transaction processed for an amount exceeding the account balance.”¹⁶ Consistent with Rep. Brown’s comments, this language is identical to the language appearing in the Overdraft Restriction of the Durbin Amendment.

However, the BCFA, as introduced, also prohibits fees for “[a] declined transaction,”¹⁷ and this prohibition is entirely absent from the Durbin Amendment. Consequently, the logical inference is that the drafters of the Durbin Amendment clearly understood that overdraft fees and decline fees are two different types of fees, and only decided to include overdraft fees in the final Durbin Amendment. In other words, if Congress had intended to prohibit decline fees in the

¹² 12 CFR Part 1030.

¹³ See Official Interpretation to 12 CFR §1030.11(a)(1).

¹⁴ *“With respect to this, we also added pro-consumer language that [Rep.] Sander Levin has in a bill to prohibit overdraft fees and fees on the first monthly ATM withdrawal using one of these cards.”* 156 Cong. Rec. H5257 (daily ed. June 30, 2010) (statement of Rep. Brown)

¹⁵ <https://www.congress.gov/bill/111th-congress/house-bill/4552/text>

¹⁶ See Section 922(d)(2)(D) of the BCFA.

¹⁷ See Section 922(d)(2)(F) of the BCFA.



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Government Benefit Card exemption and the GPR Card exemption of the Durbin Amendment, it would have expressly done so.

Costs to the Industry and Unintended Consequences

In addition to our belief that the Board Staff's interpretation of Section 235.5(d)(1) is not supported by the plain language of the statute and Congressional intent, the NBPCA is also concerned that the Board's interpretation of Section 235.5(d)(1) is overly broad, and will be harmful to many covered issuers. For example, each ATM owner/operator typically charges issuers a fee for each declined ATM transaction, so the Board Staff's interpretation set forth in New FAQ2 will force covered issuers to choose between having to absorb large third party costs from ATM decline transactions or losing the interchange fee cap exemption altogether on an entire prepaid card portfolio. Moreover, the NBPCA is concerned that other regulators will look to the Board Staff's broad interpretation of the term "overdraft" contained in New FAQ2 and conclude that declined transaction fees are valid examples of overdraft fees for purposes of other statutes/regulations. While the Board Staff noted in our earlier conversation that the FAQs were merely guidance to covered issuers for interpreting Regulation II and were not required to be relied on by other regulators, the NBPCA has legitimate concerns since banking regulators routinely look to interpretive guidance from one another in conducting their own rulemaking and enforcement activities. Thus, it is critical that the Board Staff's interpretation of the Durbin Amendment through its FAQ's remains consistent with the plain language meaning of the statute and corresponding regulations.

In addition, despite the fact that the Board Staff's interpretation contained in New FAQ2 presents a dramatic change in policy that contravenes long-standing industry practices, covered issuers were given no opportunity to provide feedback on these substantive changes as is typically required under the Administrative Procedure Act. The lack of appropriate notice and a meaningful comment period is exacerbated by the failure to provide any guidance about how covered issuers are expected to handle previously exempt cards that, in many cases, have been issued and have already expired (in some cases, several years ago) prior to the Board Staff's new interpretation in contradiction with the industry's understanding of the Overdraft Restrictions in the Durbin Amendment.

Conclusion

We disagree with the Board Staff's conclusion in New FAQ2 that imposing ATM decline fees due to a shortage of funds will cause a covered issuer of Government Benefit Cards or GPR Cards to lose the benefit of the interchange transaction fee cap exemptions under the Durbin Amendment. We believe that the Board Staff has misinterpreted the Overdraft Restrictions in



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the Durbin Amendment because ATM decline fees are the antithesis of overdraft fees as they are only imposed when a transaction is declined and an overdraft is entirely avoided.

As explained in detail above, we believe that the Board Staff's interpretation of the Overdraft Restrictions in New FAQ2 conflict with both the plain language meaning and Congressional intent of the Durbin Amendment. We also believe that New FAQ2 is inconsistent with common industry practice regarding the imposition of ATM decline fees for certain exempt programs, and constitutes an unfair surprise for those covered issuers who have continued these historical practices even after the law and corresponding regulation were passed because none of the covered issuers interpreted the Overdraft Restrictions in the same manner as Board Staff. The prevalence of the use of ATM decline fees by most, if not all, large issuers on one or more of their exempt programs should have prompted outreach to the industry to better understand their contrary interpretation of the Overdraft Restrictions. We also have serious concerns that other regulators will rely on this faulty analysis regarding the definition of "overdraft" and potentially apply this misinterpretation to other regulations and potential enforcement actions affecting the industry.

For the reasons stated above, the NBPCA respectfully believes the Board's interpretation of Section 235.5(d)(1) is inaccurate and that it will be harmful to covered issuers. The NBPCA therefore requests that the Board direct the Board Staff to quickly rescind New FAQ2 in its entirety. The NBPCA appreciates the opportunity to comment on the New FAQ2 and share its concerns with the Board.

[Continued on Following Page.]



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If you have any questions regarding the contents of this letter or desire to set up an in person meeting to discuss the NBPCA's concerns, please do not hesitate to reach out to Brad Fauss or Brian Tate at the numbers provided below.

Sincerely,

Brad Fauss
President and CEO
NBPCA
(202) 548-7200

Brian Tate
VP of Government Relations
NBPCA
(202) 507-6181

cc: Clinton Chen (clinton.n.chen@frb.gov)
Susan Foley (susan.v.foley@frb.gov)
Stephanie Martin (stephanie.martin@frb.gov)